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the bona fide purchaser of the dedicated land is no more protected than is the bona fide purchaser of land which has been acquired by a third party through adverse possession.[19] In neither case is there any instrument to be recorded. Nevertheless, in spite of this logical difficulty, in a decision under a statute similar to that in California there is language which might be taken to construe the recording acts as extending to cover all instances of dedication.[20] There was in this case, however, a written dedication. In any event, on principle it seems desirable that the recording acts be extended by statute to require some formal recordation in order to make acquisition of title either by adverse possession or by dedication binding on a bona fide purchaser for value and without notice.

C. C. H.

PLEADING: JUDGMENTS — MOTION TO OFFSET AN OUTLAWED JUDGMENT UNDER SECTION 685, CODE CIVIL PROCEDURE, AGAINST A SUBSISTING JUDGMENT—The case of *Murphy v. Davids*[1] presents an interesting and ingenious attempt to offset an outlawed judgment against a subsisting judgment. The plaintiff, in the Superior Court of Los Angeles County, recovered a $15,000 judgment against the defendant. The defendant thereafter, encouraged by section 685 of the California Code of Civil Procedure,[2] purchased several outlawed but otherwise valid judgments rendered against the plaintiff by the Superior Court of San Francisco County, and amounting in the aggregate to $11,000. After complying with the procedure required by section 685 the defendant obtained an order from the San Francisco court for execution to issue on the outlawed judgments. He then moved, in the Los Angeles court, to

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[19] 2 Tiffany, Real Property (2d ed.) 1986, §511. Yet is must be remembered that acquisition of title by adverse possession is distinguishable from acquisition of title by dedication because by adverse possession the former title is not transfered, but the wrongful possessor acquires an entirely new title. 2 Tiffany, Real Property (2d ed.) 1980, §511.

[20] Sexton v. Corporation of Elizabeth City, supra, n. 11: "Besides, as they had no actual notice, our statute, which requires the registration of deeds as bona fide purchasers for value, in order to pass the title (Revisal, §980 [Acts 1885, c. 147]), protects them against the application of the ordinary doctrine of estoppel relating to such cases."

[1] (Nov. 29, 1921) 36 Cal. App. Dec. 838, 203 Pac. 802.

[2] The pertinent part of this section is as follows: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court upon motion, or by judgment for the purpose founded upon supplementary pleadings . . . . "; this section is held constitutional though requiring no notice of the motion; Harrier v. Bassford (1905) 145 Cal. 529, 78 Pac. 1038. It is purely discretionary with the court to grant the motion or not; Wheeler v. Eldred (1902) 137 Cal. 37, 69 Pac. 619; as to what the court should consider on hearing the motion see Adjustment Co. v. Newman (1921) 61 Cal. Dec. 486, 197 Pac. 334. For similar statutory provisions in other states see Parsons Code Civ. Proc. (N. Y.), § 1377; Idaho Comp. Stats. 1919, § 6914; Ind. Burns Ann. Stats. 1914, § 717.

offset the outlawed judgments against the judgments there recovered against him by the plaintiff. The motion was denied and on appeal to the District Court of Appeal the decision was affirmed on the ground that section 685 does not authorize an independent action to enforce an outlawed judgment in a court other than that in which it was rendered, and that a motion to offset a judgment is an independent proceeding, extraneous to any exercise of power of the court by which the judgment sought to be offset was rendered, and therefore not authorized by section 685.[3]

The power of the court to offset one judgment against another must not be confused with the statutory right of the defendant to plead a setoff or counterclaim as provided in the Code of Civil Procedure.[4] It has existed from time immemorial[5] and is not dependent on statute but is based on the general jurisdiction of the court over its suitors and its inherent powers in the administration of justice.[6] The exercise of this power is in a sense a usurpation of equitable jurisdiction.[7] It is probably for this reason that it is regarded as discretionary with the court to a certain extent, i. e., it is not demandable as a matter of right but may be refused, even though a proper case is made out, if to allow it would be inequitable under all the circumstances.[8] When allowed, this relief is ordinarily obtained by motion in a court of law, but in cases where the rights of the parties are complicated and difficult of adjustment a separate bill in equity is the proper method of procedure.[9]

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[3] The court relies chiefly on Doehla v. Phillips (1907) 151 Cal. 488, 91 Pac. 330, in which case it is held that the procedure authorized by section 685 is that of a "mere subsequent step in an action or special proceeding already commenced."

[4] Cal. Code Civ. Proc., §§ 438 and 440.

[5] Ramsey's Appeal (1834) 2 Watts 230, 27 Am. Dec. 301; Barbour v. Nat'l Exch. Bank (1893) 50 Ohio 90, 33 N. E. 542, 20 L. R. A. 192.

[6] Haskins v. Jordan (1898) 123 Cal. 157, 55 Pac. 786; Pierson v. Farmers State Guaranty Bank (1918) (Tex. Civ. App.) 206 S. W. 730; II Black on Judgments, § 1000; II Freeman on Judgments, § 467; note 109 Am. St. Rep. 137, 139.

[7] Reed v. Smith (1908) (N. J.) 158 Fed. 889; Ehrhart v. Esbenshade (1913) 53 Pa. Super. Ct. 258; Rookard v. Atlanta etc. Ry. (1911) 89 S. C. 371, 71 S. E. 992.

[8] Beecher v. Vogt Mfg. Co. (1920) 227 N. Y. 468, 125 N. E. 831; Elms v. Arn (1916) 59 Okl. 235, 158 Pac. 1150; Schuler v. Collins (1901) 63 Kan. 372, 65 Pac. 662; II Black on Judgments, § 1000; for good discussion see note 109 Am. St. Rep. 137, 140, where it is suggested that this relief becomes more a matter of right in states where it is provided for by statutes, as for example in Mont. Rev. Stats. 1889, § 8168, and Ala. Code 1907, § 5861; this power being discretionary, it has been held that its exercise cannot be questioned on appeal; Barbour v. Exchange Bank, supra, n. 5, but this is probably erroneous; see Leitz v. Hohman (1904) 207 Pa. St. 289, 56 Atl. 868, 99 Am. St. Rep. 791.

[9] Hobbs v. Duff (1863) 23 Cal. 596; Elms v. Arn, supra, n. 8; Kretsch v. Denofrio (1910) 137 App. Div. (N. Y.) 617, 122 N. Y. S. 242; II Black on Judgments, § 1000; note 109 Am. St. Rep. 137, 139; the note-writer suggests that the relief might frequently be refused in equity on the grounds that the remedy at law is adequate.

It is well established that a judgment in order to be the subject of offset must be valid and subsisting.[10] However, these requirements may be dispensed with in certain cases where a refusal of the relief would work extreme hardship on the defendant, and it has been held that in the event of such a situation a dormant judgment may even be offset against a subsisting judgment.[11] It is nevertheless clear that in the absence of the usual requirements such relief will be granted only in extreme cases; and even assuming that this rule might be applied to outlawed judgments on which execution has been issued under section 685, still there is in the instant case no showing of hardship sufficient to entitle the defendant to such extraordinary relief. It does not appear that the plaintiff is insolvent[12] or that the rights of third parties intervene.

In view of the fact that this discretionary power of the court is clearly equitable in its nature[13] it may well be argued that technical difficulties such as are presented in the instant case should be circumvented if possible, and the setoff allowed between the parties whenever by so doing justice will be accomplished. It must be remembered, however, that there can be no possible authority for offsetting outlawed judgments except such as is found in section 685, and while the wording of that section may not require the narrow construction placed thereon in Doehla v. Philips,[14] on the other hand it certainly does not authorize an independent action on an outlawed judgment.[15] It has been held that a bill in equity to offset one judgment against another is an action on the judgment within the meaning of the statute of limitations,[16] and it would seem that it must necessarily follow that a motion in a court of law for the same purpose is also in the nature of an action on the judgment. The proceeding is the same, in

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[10] II Black on Judgments, § 1005; Note 109 Am. St. Rep. 137, 149; 15 R. C. L., § 290.

[11] Simpson v. Huston (1855) 14 Tex. 476; Camp v. Pace (1869) 40 Ga. 46, 42 Ga. 162.

[12] In Simpson v. Huston, supra, n. 11, the insolvency of the plaintiff is the controlling reason for allowing the defendant to offset a dormant judgment.

[13] Supra, n. 7.

[14] Supra, n. 3.

[15] Heinlen Co. v. Cadwell (1906) 3 Cal. App. 80, 84 Pac. 443; see also In re Rebman (1906) 80 C. C. A. 594, 150 Fed. 759 (Cal.). But see Saunders v. Simms (1920) 183 Cal. 167, 190 Pac. 806, where the Supreme Court says "Section 685 is a limitation upon the operation of the statute of limitations under section 336 of the Code of Civil Procedure to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by statute"; while this language is broad, taken in connection with the case under consideration it probably was intended only to mean that the judgment may be enforced by execution or by any other means provided by the code as a substitute for execution.

[16] Hobbs v. Duff, supra, n. 9; see also Dieffenbach v. Roch (1889) 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; II Black on Judgments, § 1000; but see Clark v. Story (1859) 29 Barb. (N. Y.) 295.

essence, whether brought at law or in equity, the only distinction being that in case the rights of the parties are not complicated and are easy of adjustment the relief may be had by motion on the law side of the court, whereas if the rights are involved and difficult of settlement a separate bill in equity is resorted to.[17]

It is to be noted, however, that viewed from a practical standpoint the result of the decision seems more doubtful. It must necessarily lead to circuity of action, for the defendant having paid the plaintiff's judgment may immediately levy execution on the funds and apply $11,000 thereof in satisfaction of his own judgment, thus in effect accomplishing a setoff.

It may well be that the peculiar situation here presented should authorize an exception to the general rule which prevents an outlawed judgment being used as the basis of a setoff. But this could be allowed only in cases where the rights of third parties would not be prejudiced, and since in any case where the rights of third parties do not intervene the defendant can, in effect, accomplish a setoff by the means suggested above, no substantial injustice results, and the decision may, therefore be upheld as a harmless sacrifice of expediency to preserve the continuity of the law.[18]

L. A. C.

RESTRAINT OF TRADE: CLAYTON ACT—Section three of the Clayton Act[1] prohibits contracts of sale, or leases made upon the condition, agreement or understanding that the purchaser or lessee shall not deal in nor use the goods of a competitor of the seller or lessor where the effect of such sale or lease ". . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The first important complaint under the Clayton Act was filed in October, 1915, at St. Louis, against the

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[17] Supra, n. 9.

[18] As opposed to the decision in the instant case it may be said that: (1) the wording of 685 ("a judgment may be enforced or carried into execution") is broad enough to allow of a setoff; (2) the language of the Supreme Court in Saunders v. Simms, supra, n. 15, seems to approve of a broad interpretation of this section; (3) a motion to offset a judgment is not in the nature of an action thereon but is merely one means of enforcing the judgment; (4) the essential requisite which must be present in a judgment in order that it be the basis of a setoff is that it be enforceable by execution; (5) the Supreme Court has quoted with approval the rule, as stated in Waterman on Setoff, § 339, that "ordinarily, judgments may be set off whenever the executions issued thereon could be set off one against the other by the officer who may have them in his hands for service." Haskins v. Jordan, supra, n. 6

[1] Act of October 15, 1914, c. 323, 38 U. S. Stat. at L. 730, 731, U. S. Comp. Stat. (1918) §8835c, Barnes' Fed. Code (1919) §7960, 9 Fed. Stat. Ann. (2d ed.) 733. The Clayton Act also makes it unlawful to discriminate in prices for the purpose of injuring or destroying the business of competitors. Labor and agricultural organizations are exempted from the operation of the Anti-Trust laws.